

No. 19673

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**United States**  
**COURT OF APPEALS**  
**for the Ninth Circuit**

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SIMPSON TIMBER CO. and  
GRACE LINE, INC.,

*Appellants,*

v.

EZRA PARKS,

*Appellee.*

SIMPSON TIMBER CO.,

*Appellant,*

v.

GRACE LINE, INC., and  
BRADY-HAMILTON STEVEDORE CO.

*Appellees.*

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**PETITION FOR REHEARING OF APPELLEE EZRA PARKS**

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*Appeal from the United States District Court  
For the District of Oregon*

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Appellee Ezra Parks petitions the Court for a rehearing upon the following grounds:

**I. The court erred as to Simpson Timber Company:**

A. In stating that the giving of the instruction held to be reversible error was one of Simpson's "main

points" on appeal (Op. 3), when it has never asserted any such point as a main, subsidiary, or any other point, nor has it claimed any other error with respect to the instructions given.

B. In stating that Simpson objected to the instruction (Op. 3), when the only exception taken by Simpson on the issue of liability (Tr. 298-299) raised no such issue.

C. In reversing for the giving of an instruction embodying a principle of law to which Simpson never objected at any time. Simpson did not take exception to the instruction, it did not object to plaintiff's pre-trial contentions (R. 91), and when it moved for a new trial, it made no claim that the court erred in giving any instruction whatever (R. 131-134). Reversal is flatly contrary to the rule of this Court that in civil cases a judgment will not be reversed for alleged error not objected to, even when there is "plain error." *Crespo v. Fireman's Fund Indemnity Co.*, 318 F.2d 174, 175 (C.A. 9, 1963); *Rudick v. Prineville Memorial Hospital*, 319 F.2d 764, 770 (C.A. 9, 1963); Federal Rules of Civil Procedure, Rule 51.

D. In reversing the cause for the giving of a constructive notice instruction in all respects consistent with the instructions requested by Simpson. See Requested Instructions II, III, XII, XVII, XXI and XXII (R. 105, 106, 115, 120, 124, 125). For example, immediately before, and as part of the same instruction for which the Court now reverses, the trial court instructed (Tr. 273):

“Now, specifically in this case, as the manufacturer and the packager of the doors in question, Simpson Timber Company was under a duty to exercise reasonable care to employ such materials and methods in the construction and the packaging of the doors or warning of danger, if any there was, as were appropriate to the use for which it was intended and would render the packaged doors reasonably safe for handling in the course of shipment *as Simpson Timber Company might reasonably be charged with in anticipation of the fact that the goods would flow in commerce.*” (Emphasis supplied.)

With insignificant changes, this was Simpson’s Requested Instruction XXI. The trial judge noted that he was following Simpson’s instructions “almost verbatim” (Tr. 259). See also, paragraph 15 of Simpson’s Motion for New Trial (R. 134) asserting that the court erred in *not* giving an instruction embodying the constructive notice principle for which the Court reverses.

E. In holding that the instruction in question implicitly contained a requirement that Simpson make inquiry, when the instruction made no such requirement, but merely required that Simpson use “reasonable care.”

F. In depriving plaintiff of due process of law and the right to a jury trial as guaranteed by the 5th and 7th Amendments to the United States Constitution in reversing for the giving of an instruction which was neither excepted to nor asserted as error

on appeal; and when plaintiff has never been given an opportunity to be heard with respect to the correctness of the instruction.

## **II. The court erred as to defendant Grace Line:**

A. In reversing as to liability for the giving of an allegedly erroneous instruction when Grace Line raised no issue of liability on appeal, specifically limited its petition for rehearing to damages only, and took no exception to the instructions of the trial court (Tr. 298); and when the instruction in question could not possibly have affected the liability of Grace Line.

B. In reversing for the giving of an instruction which was not excepted to, and when no issue of liability was raised by Grace Line in the court below, contrary to the uniform refusal of this Court to apply a rule of "plain error" in civil cases. *Crespo v. Fireman's Fund Indemnity Co.*, 318 F.2d 174, 175 (C.A. 9, 1963); *Rudick v. Prineville Memorial Hospital*, 319 F.2d 764, 770 (C.A. 9, 1963).

C. In depriving plaintiff of due process of law and the right to a jury trial under the 5th and 7th Amendments to the United States Constitution by reversing a jury verdict as to Grace Line for the giving of an instruction which was not excepted to, which was not asserted as error on appeal, and with respect to which, and its effect, if any, on Grace Line, plaintiff has never been given an opportunity to be heard.

D. In reversing as to liability when the vessel was unseaworthy because, as the Court states, "Used as a floor or walking surface, the bundle of doors was a trap" (Op. 4).

### CONCLUSION

The opinion of this Court decides issues which were first raised by the Court itself, after the parties, in briefs, petitions and two arguments, had never asserted them. Plaintiff has never been heard on these issues. It is manifestly unjust to reverse a judgment in favor of plaintiff for the giving of an instruction which was essentially that requested by the defendant as to whom it is held to be error, which did not affect the other defendant, and to which no exception was ever taken or any error asserted on appeal by either defendant.

POZZI, LEVIN & WILSON

PHILIP A. LEVIN

Attorneys for Appellee-Petitioner  
Ezra Parks

**CERTIFICATE OF COUNSEL**

I certify that, in connection with the preparation of this petition, I have examined Rule 23 of the United States Court of Appeals for the Ninth Circuit and that in my opinion the foregoing petition is in full compliance with that rule. I further certify that this petition is in my judgment well founded and is not interposed for delay.

PHILIP A. LEVIN

Of Attorneys for Petitioner